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July 18, 2016

Gregory O. Block
Clerk, U.S. Court of Appeals for Veterans Claims
625 Indiana Avenue, NW, Suite 900
Washington, D.C. 20004-2950

Re: *Southall-Norman v. McDonald,* No. 15-1357
Supplemental Citation of Authority

Dear Mr. Block:

Pursuant to Rule 30(b), U. S. Court of Appeals for Veterans Claims, appellant provides the following citations: *Ebron v. Shinseki*, No. 13-1296, 2014 WL 1778434 (Vet. App. May 6, 2014); *Davis v. Shinseki*, No. 12-2013, 2013 WL 6622931 (Vet. App. Dec. 17, 2013). These two citations were found while preparing for oral argument. They are pertinent and no clear precedent exists on point. *See* Rule 30(a).

In the Court's memorandum decision in *Ebron*, it made reference to a December 2011 joint motion for remand in that case, "which the Court granted, ordering the Board to address the applicability of 38 C.F.R. § 4.71a, Diagnostic Code (DC) 5276, and 38 C.F.R. § 4.59 to Mr. Ebron's claim." *Ebron*, 2014 WL 1778434, at * 1. The Court elaborated on the terms of the JMR, noting that it indicated: "although the Board denied entitlement to a 30% disability rating under DC 5276, it did not consider whether Mr. Ebron may be entitled to a 10% disability rating under that provision. The JMR also noted that, although the Board acknowledged that Mr. Ebron's pes planus was manifested by pain when walking and standing, it neglected to discuss the applicability of 38 C.F.R. § 4.59, in light of the facts in this case and the Court's decision in *Burton v. Shinseki,* 25 Vet.App. 1 (2011)." *Id.* (first internal citation omitted).

Additionally in the Court's memorandum decision in *Davis*, the Court noted, "[t]he Secretary . . . concede[d] that the Board did not provide an adequate statement of reasons or bases for its determination that a compensable disability rating was not warranted pursuant to § 4.59 for the appellant's bilateral foot disabilities." *Davis*, 2013 WL 6622931, at *4. The Court went on to note, "[s]pecifically, as the February 2007 feet examination showed that the appellant experienced 'MP joint pain on motion of the great toe bilaterally[,]' a minimum compensable rating pursuant to § 4.59 may be warranted where joint pain, alone, exists." *Id.* (internal citation omitted). In conclusion, "the Court agree[d] that a remand [was] warranted for the Board to address § 4.59 in the context of higher ratings for the appellant's bilateral foot disabilities." *Id.*

In the Veteran's opening brief, she argued that remand was warranted for the Board to consider 38 C.F.R. § 4.59 in adjudicating her claim. Apa. Open. Brief at 6-10. The Veteran had painful feet and was rated at a non-compensable level during a period on appeal for her bilateral foot disability to include pes planus and hallux valgus. *See id.* The Secretary argued that remand was not warranted, as § 4.59 only applies to diagnostic codes that contain range of motion criteria, which, he contends, DC 5276 and 5280 do not have. Sec. Brief at 7-11. The Secretary argues this interpretation is entitled to deference. *See id.* The Appellant, in reply, argued that the plain language of the regulation does not indicate that § 4.59 is limited only to diagnostic codes predicated on limitation of motion. Apa. Reply Brief at 1-3.

Very truly yours,

Christian A. McTarnaghan

VIA CM/ECF SYSTEM